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SERVICE DATE - APRIL 11, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. MC-C-35000

TRIPLE E TRANSPORT, INC. —
PETITION FOR DECLARATORY ORDER

Decided: April 6, 2000

In a decision served June 24, 1999 (Reconsideration decision), we reversed a decision of the Director of the Office of Proceedings served May 12, 1998 (Director decision), and instituted this declaratory order proceeding. This proceeding was begun pursuant to 49 U.S.C. 13710(b),¹ to resolve a dispute between Triple E Transport, Inc. (Triple E or petitioner), a motor carrier of property, and U.S. Pipe and Foundry Company, Inc. (U.S. Pipe), a shipper, over whether a certain shipment moved in common carriage or contract carriage. The dispute involves transportation in interstate commerce that occurred before enactment of the ICC Termination Act of 1995, Pub. L. No.104-88, 109 Stat. 803 (ICCTA).² We find that the shipment moved in contract carriage.

¹ RESOLUTION OF DISPUTES OVER STATUS OF COMMON CARRIER OR CONTRACT CARRIER.—If a motor carrier (other than a motor carrier providing transportation of household goods) that was subject to jurisdiction under subchapter II of chapter 105, as in effect on the day before the effective date of this section, and that had authority to provide transportation as both a motor common carrier and a motor contract carrier and a dispute arises as to whether certain transportation that was provided prior to the effective date of this section was provided in its common carrier or contract carrier capacity and the parties are not able to resolve the dispute consensually, the Board shall resolve the dispute.

² ICCTA, which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board).

BACKGROUND

Petitioner holds operating authority, originally issued by the ICC, in No. MC-198497, to operate both as a motor common carrier of property³ and as a motor contract carrier of property.⁴ On or about March 1, 1992, petitioner signed a “Master Transportation Agreement” (the master agreement) with U.S. Pipe.⁵ The master agreement generally purports to be a transportation contract under which U.S. Pipe agreed to use petitioner’s contract carrier services at rates specified in that agreement.

Petitioner also had on file with the ICC certain tariffs governing its rates, charges, and practices applicable to operations as a common carrier.⁶ It appears that petitioner filed only two tariffs with the ICC, both of which were effective during 1993 (when, as indicated below, the shipment in question moved):⁷ ICC TETB 200-A, issued June 17, 1993, and effective June 30, 1993, was applicable on the transportation of “fire brick, fire clay, ground prophyllite ore and refractory products” for the account of North State Prophyllite, Piedmont Minerals, and Resco Products; and ICC TETB IM-1000, issued July 20, 1993, and effective July 25, 1993, was applicable on the transportation of “general commodities in trailer or containers, and empty containers, trailers and trailer chassis, having immediate prior or subsequent movement via rail or water.”

On October 18, 1993, U.S. Pipe tendered an interstate shipment of ductile iron pipe (and supplies) to petitioner. U.S. Pipe issued a standard, short-form, uniform straight bill of lading⁸ for the shipment, which weighed 41,247 pounds, originated at North Birmingham, AL, where it was loaded onto the trailer by U.S. Pipe, and was destined for delivery to two locations at Normal and Bloomington, IL. Entered on the bill of lading form was a rate reference of “1.83/CWT” (or \$1.83 per hundred pounds).

³ The certificate in No. MC 198497 (Sub 1) was issued on October 24, 1991.

⁴ The permit in No. MC 198497 (Sub 0-P) was issued on July 21, 1987.

⁵ A second, similar master agreement was executed on November 22, 1993.

⁶ We take official notice of these filings, as maintained in the ICC’s archival records.

⁷ Triple E did not participate in any Southern Motor Carriers Rate Conference tariffs in 1993 or 1994.

⁸ The bill of lading form refers in general to common carrier classifications and tariffs applicable to the shipment: “RECEIVED, subject to the classification and tariffs in effect on the date of the issuance of this Bill of Lading.”

Petitioner's vehicle was involved in an accident in which the driver of a third vehicle was killed. The decedent's estate sued U.S. Pipe, petitioner, petitioner's driver, and the driver of the other vehicle involved in the accident. The litigation was settled in May 1996, and U.S. Pipe paid \$250,000 over and above payments by the insurers covering petitioner and the other driver. The terms of the master agreement include provision for indemnification or reimbursement by petitioner of any legal payments by U.S. Pipe.

ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

U.S. Pipe filed an action in state court for enforcement of the indemnity provisions in the master agreement.⁹ During the pendency of this suit and shortly before it was to go to trial, Triple E filed with the Board a petition for declaratory order seeking a determination that the shipment in question moved in common carriage—not in contract carriage—asserting that, consequently, the reimbursement claim could not stand. The court had not referred the matter to us. The petition was submitted to the Board on December 30, 1997 (and apparently filed in state court on December 9, 1997), but the petition was not accepted by the Board until January 15, 1998, upon the submission of the applicable filing fee. In the interim, a jury verdict in favor of U.S. Pipe was entered on January 7, 1998. Subsequently, the Alabama Supreme Court denied an appeal on January 15, 1999, in Triple E Transp., Inc. v. United States Pipe & Foundry Co., 732 So.2d 290 (1999), holding that the defense of federal preemption had been waived because it had not been affirmatively pleaded.¹⁰ Triple E's application for rehearing was denied by the Alabama Supreme Court on April 9, 1999. The Board was not aware of these decisions until after we issued our Director and Reconsideration decisions.

The Director decision denied Triple E's petition seeking a declaratory order, concluding that the Board should not exercise its discretion under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order, because the petitioner had failed to show that the Board's expertise is required to resolve this dispute. The Reconsideration decision reversed the Director decision, instituted this declaratory order proceeding, and set a procedural schedule. In response, U.S. Pipe filed a motion to dismiss on July 23, 1999, Triple E filed a pleading on July 26, 1999,¹¹ and U.S. Pipe filed a response to this pleading on August 13, 1999.

⁹ The suit was filed before the Circuit Court of Jefferson County, Alabama, in U.S. Pipe v. Triple E Transport, Inc., Case No. CV 96-3625 JDC.

¹⁰ The court also, inter alia, upheld the jury's determination that the "special needs" requirement for motor contract carriage had been met, and that the indemnity clause applied in this situation.

¹¹ The Reconsideration decision requested that Triple E file an opening statement on July 26, 1999. Triple E termed its filing a petition for declaratory order. As noted, it had previously filed a petition for declaratory order on January 15, 1998. Although entitled to do so, Triple E did not file a rebuttal.

CONTENTIONS OF PARTIES

Triple E asserts that it held common carrier authority and had tariffs on file that covered the shipment at issue. The bill of lading it submitted is allegedly “a creature of a tariff.” This bill of lading, it claims, determines the liabilities and rights of the parties. The transportation agreement, according to Triple E, can not be allowed to override the bill of lading.

Triple E also claims that it provided only common carrier service to U.S. Pipe. Triple E asserts that the “distinct needs” test for contract carriage which was in effect prior to ICCTA and codified under former 49 U.S.C. 10102(16)(B) has not been met. Both common and contract carriers, according to Triple E, provide flat bed trailers, strap loads and string pipe. Triple E asserts that it did not assign any vehicles.

Triple E argues that the Board has exclusive jurisdiction and the Alabama state court decisions are void. It submits that states have no jurisdiction over interstate or intrastate freight service pursuant to 49 U.S.C. 14501.

U.S. Pipe has moved to dismiss the petition on grounds of collateral estoppel. It argues (1) that the issues brought before the Board are the same as ones in the state action that the jury decided and the Alabama Supreme Court upheld on appeal — whether the shipment in dispute moved under common or contract carriage and whether the indemnity provision was enforceable; (2) that resolution of these issues was necessary to the prior judgment; and (3) that Triple E and U.S. Pipe are the same parties in the state action and before the Board. U.S. Pipe also contends that the state Supreme Court decision is final and unappealable, and that the Board has no jurisdiction to relitigate issues decided previously by the state courts, nor to overrule or void state court rulings.¹²

Concerning the merits of the petition, U.S. Pipe argues that boilerplate language in a bill of lading does not bring the movement under common carriage. Such a result, U.S. Pipe claims, would negate the intent of the parties, as well as the fact that the contract was executed and transportation performed under the contract. U.S. Pipe contends that no Triple E tariff existed to govern the movement; that Triple E had contract carriage authority at the time of the shipment; that the parties had a transportation agreement and the shipment moved under that agreement; that U.S. Pipe was billed and paid to Triple E the rates in the master agreement; that the agreement was a continuing one; and that the transportation under the agreement was designed to meet the distinct needs of U.S. Pipe.

¹² In light of our findings below, this motion is moot and will be denied.

DISCUSSION AND CONCLUSIONS

Upon consideration of the record in this proceeding, we find that Triple E performed the transportation at issue as a contract carrier.¹³ In Ford Motor Co. v. Security Services f/k/a Riss Intl., 9 I.C.C.2d 892, 895 (1993) (Ford), the ICC stated that a determination that challenged traffic is contract carriage is based upon findings that: (1) a carrier held appropriate contract carrier authority to provide the service; (2) the shipper and the carrier reached an agreement that the transportation to be provided was to be contract carriage; and (3) the shipments moved under the parties' agreement in a manner consistent with the statutory definition of contract carriage.

Under former 49 U.S.C. 10102(16)(B), a motor contract carrier of property is defined as

a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons—(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or (ii) designed to meet the distinct needs of each such person.

Here, the facts clearly indicate that the service provided was contract. First, Triple E held a valid permit to operate as a motor contract carrier. Second, U.S. Pipe and Triple E executed the master agreement, which constitutes a sophisticated contract for transportation services. This contract, dated March 1, 1992, contained nine pages plus exhibits and was signed by Triple E's president and U.S. Pipe's traffic manager. Finally, U.S. Pipe submitted a verified statement that claims that it paid Triple E the rates designated in the agreement, and Triple E never indicated that it intended to serve as a common carrier or charge common carrier rates. The bill of lading appears to be consistent with U.S. Pipe's claim that it paid the contract rate.¹⁴

¹³ We deny the motion to dismiss of U.S. Pipe. In any event, the issue is essentially moot, because we, like the jury, are finding that contract service was involved. Under section 13710(b), in disputes over whether transportation moved in contract or common carriage, "the Board shall resolve the dispute."

¹⁴ As noted, the bill of lading form contained the rate reference of "1.83/CWT." While not clear, this reference appears to track the rates set out in the master agreement. That agreement provided for a "rate factor" of ".3250" for shipments moving from points in Jefferson County, AL, to points in Illinois. Multiplying the "rate base mileage" of "563" from Jefferson County to McLean County, IL (not indicated in the copied pages of the master agreement that were submitted to us, but taken from copies of the later agreement), by the rate factor (.3250 x 563) produces 182.975, which, under the master agreement, is to be rounded off to the nearest cent. "Triple E believes it was meant to be '18[2].975 per ten thousand pounds of load' which would be 1.83 per hundred pounds." Petition for declaratory order at 16.

In addition, the statutory criteria for contract carriage were met. First, the agreement was a continuing agreement to provide transportation that would continue in effect until terminated by either party on no less than 30 days' notice. Second, Triple E's services met the distinct needs of U.S. Pipe.¹⁵ U.S. Pipe notes that it needed secure flatbed trailers for its iron ductile pipe, carriers that could ship safely and reliably, and that would indemnify it against loss and damage resulting from the transportation. U.S. Pipe also required that the carrier increase its cargo insurance to \$50,000 per shipment and modify its insurance policy to include U.S. Pipe as an additional insured.¹⁶ To the extent that Triple E argues that these services may be equally available from common carriers, the ICC found that common carriage can physically resemble contract carriage service, with the "distinct needs" test being met by service and/or price considerations. See RPL Associates, Inc. — Petition for Declaratory Order — Certain Rates and Practices of Intermodal Transportation Services, Inc., Docket No. 40966 (ICC served June 28, 1995).

Triple E also maintains that it must be found to have acted as a common carrier, because a bill of lading was issued, which, it argues, conclusively defines the transportation service as common carriage. Bills of lading, however, are also issued pursuant to contract carriage. See Regalite Plastic Corp. — Petition for Declaratory Order — Certain Rates and Practices of R.C. Freightways, Inc., STB Docket No. 41610 (STB served Mar. 8, 1998).¹⁷

Nor would it make any difference, as Triple E claims, had there been a common carriage rate that could potentially have governed this traffic because during the tariff era, carriers often maintained class rates, freight-all-kind, or other similar kinds of back up rates that were available to be applied to any traffic. Common carriage and contract carriage are two distinct ways of providing motor carrier service, and the availability of common carriage tariffs does not trump the shipper and carrier's intent, under Ford, to move on a contract carriage basis.

But, in any event, from the ICC's archival records, we take official notice that petitioner had no tariffs, rates, rules or regulations on file in 1993 that would be applicable to any non-intermodal

¹⁵ It is not necessary to reach the alternative standard of assigned vehicles.

¹⁶ The Alabama Supreme Court, 732 So.2d at 293, observed that Triple E provided such special requirements as (a) flatbed trailers for carrying ductile-iron pipe, (b) drivers trained and able to strap down ductile-iron-pipe cargo, (c) the capability of delivering supplies to "off-road" customers, and (d) the ability to negotiate for specific items such as a special rate scale, insurance coverage, and indemnity.

¹⁷ "A bill of lading serves three distinct functions. It is a receipt for goods, a contract for carriage and a document of title." Bills of Lading, Ex Parte No. 495 (ICC served June 28, 1993). The Alabama Supreme Court, 732 So.2d at 293, considered the bill of lading to be a shipping document, in essence a receipt, that specifies such things as the name and address of the consignee and a description of the cargo, but does not determine the applicable law.

motor carrier shipments of ductile iron pipe between North Birmingham, AL, and Bloomington, IL. Triple E asserts that applicable tariffs existed, but can no longer be located. The archival tariff files from the ICC do not indicate that this is the case, except for the two particular tariffs noted above. Though Triple E asserts that additional tariffs must have been on file before the ICC would have issued a certificate, the ICC's practice, at that time, was to issue a certificate before any tariff was submitted for filing. Operations, however, could not lawfully begin until tariff regulations, inter alia, had been complied with. See Executive Moving & Trucking Co., Inc. Common and Contract Carrier Application (Exeter, NH), No. MC-167037 (Sub-No. 1) (ICC served July 18, 1986). It thus appears that the only lawful method of transporting the shipment at issue was under Triple E's contract carrier authority.

Accordingly, we find that the shipment moved under contract carriage. Under the Ford criteria, Triple E held contract authority, the parties entered into an agreement for contract carriage, and the shipment moved consistently with the statutory definition of contract carriage. Finally, because there is no indication that Triple E had a common carrier tariff on file that would have been applicable to this shipment, there is no basis to conclude that the shipment might have been common carriage.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion to dismiss is denied.
2. This proceeding is discontinued.
3. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary